85-405

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANA M. UVIEDO,
Petitioner

v.

STEVES SASH AND DOOR COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LESLIE STEPHEN MENDELSOHN
MENDELSOHN, HEIDELBERG & BEER, INC.
1010 InterFirst Plaza
San Antonio, Texas 78205
(512) 222-2271
Attorneys for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

6 pp

QUESTIONS PRESENTED

1. Did the court of appeals err in refusing to enforce the trial court approved settlement of attorneys' fees stipulated by the parties where petitioner pled and successfully proved wage and promotion national origin discrimination in violation of Title VII of the Civil Rights Act of 1964?

2. Whether a Title VII prevailing party plaintiff is one who succeeds on any significant issue whch achieves some of the benefit sought in litigation or, as held by the Fifth Circuit Court of Appeals, one who is successful on the central issue as exhibited by the fact that he has acquired the primary relief sought.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI	4
1. Did the court of appeals err in refusing to enforce the trial court approved settlement of attorneys' fees stipulated by the parties where petitioner pled and successfully proved wage and promotion discrimination in violation of Title VII of the Civil Rights Act of 1964?	7
2. Whether a Title VII prevailing party plaintiff is one who pleads and successfully proves an important matter in the course of litigation or, as held by the Fifth Circuit Court of Appeals, one who is successful on the central issue as exhibited by the fact that he has acquired the primary relief sought.	11
A. The Decisions Below Defeat The Legislative Purposes of Title VII And Obstruct The Congressional Intent To Award Attorneys' Fees To Private Attorneys General To Enforce Civil Rights Acts.	11
B. The Decisions Below Conflict With Decisions of Other Courts of Appeal As To The Proper Threshold For Awarding Attorneys' Fees To A Prevailing Party Plaintiff Under 42 U.S.C. Sec. 2000e-5(k).	16
C. The Decisions Below Conflict With Decisions Of The Supreme Court Regarding Entitlement To Attorneys' Fees Under 42 U.S.C. Sec. 2000e-5(k).	18
CONCLUSION	21
APPENDIX	1a
Uviedo v. Steves, 738 F.2d 1425	1a
Uviedo v. Steves, 753 F.2d 369, On Petition for Rehearing, granted in part	21a
Uviedo v. Steves, 760 F.2d 87, On Petition for Rehearing *en banc, denied*	30a

TABLE OF AUTHORITIES

CASES Page

Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) 6
Austin v. Department of Commerce 242 F.2d 1417 (Fed. Cir. 1984) 17
Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) 13
Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978) 12
Copland v. Marshall, 594 F.2d 244 (D.C. Cir. 1978) 9
EEOC v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979) 9
Environmental Defense Fund, Inc. v. E.P.A., 716 F.2d 915 (D.C. Cir. 1983) 16
Gingras v. Lloyd, 740 F.2d 210 (2nd Cir. 1984) 16
Gunn v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), *cert. denied*, 423 U.S. 1984 (1975) .. 9
Hall v. Cole, 412 U.S. 1 (1973) 12
Hanrahan v. Hampton, 466 U.S. 754 (1980) 11
Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983) 4, 5, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20
In Re Kansas Congressional District Reapportionment Cases, 745 F.2d 611 (10th Cir. 1984) 17
Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3rd Cir. 1985) 16
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) 9
Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979), *aff'd on rehearing en banc*, 636 F.2d 1364 (5th Cir. 1981) ... 14, 15
Keeton v. Rike, 559 P.2d 262 (Colo. 1977) 8
Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 186 (6th Cir. 1983) 16
Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980) 9
Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981) 9
Lotz Realty Company v. U. S. Department of Housing, 717 F.2d 929 (4th Cir. 1983) 16
Lummi Indian Tribe v. Oltman, 720 F.2d 1124 (9th Cir. 1983) 17
Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 16, 17, 19, 20
Miami Herald Publishing Co. v. City of Hallandale, 742 F.2d 590 (11th Cir. 1984) 16

CASES

	Page
Mills v. Electric Autolight Company, 396 U.S. 375 (1970)	13
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)	16
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	6, 12, 13, 14, 18
Omaha Tribe of Nebraska v. Swanson, 736 F.2d 1218 (8th Cir. 1984)	17
Pettway v. American Cast Iron Company, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)	8, 9
Phillips v. Smalley Maintenance Services Inc., 711 F.2d 1524 (11th Cir. 1983)	9
Rainsbarger v. Columbia Glass & Window Co., 36 FEP Cases, 1305 (W.D. Mo. 1984)	9
Scott v. Immigration and Naturalization Services, 358 U.S. 214 (1966)	17
Smith v. Robinson, 468 U.S. ____, 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984)	6, 11
Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984) *rehearing granted in part*, 753 F.2d 369 (5th Cir.) *rehearing en banc denied*, 760 F.2d 87 (5th Cir. 1985)	3, 4, 7, 8, 10, 16, 18, 19, 20
Van Fossen v. International Brotherhood of Teamsters, 649 F.2d 1243 (7th Cir. 1981)	9

STATUTES

28 U.S.C. Sec. 1254(1)	2
Civil Rights Act of 1964, Title VII, 42 U.S.C. Sec. 2000e, *et seq.*	2, 5, 6, 7, 8, 9, 10, 11, 12, 19, 20
Civil Rights Act of 1964, Title VII, 42 U.S.C. Sec. 2000e-5(k)	2, 3, 4, 8, 11, 16, 18
Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. Sec. 1988	11

RULES OF PROCEDURE

Rule 54	15

MISCELLANEOUS

110 Cong. Rec. 12724 (1964)	12
H. Rep. 95-1588, 94th Cong., 2nd Sess. (1976)	13
6 *Moore's Federal Practice*, Sec. 54.70[4], 1306-07 (1984)	15
S. Rep. 94-1011, 94th Cong., 2nd Sess. (1976)	11, 12, 13, 14
Webster's New International Dictionary of the English Language	8

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANA M. UVIEDO,
Petitioner

v.

STEVES SASH AND DOOR COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, ANA M. UVIEDO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding May 13, 1985.

OPINIONS BELOW

The court of appeals opinion is reported at 738 F.2d 1425. Its opinion partially granting petitioner's petition for rehearing is reported at 753 F.2d 369. The opinion by the court of appeals denying petitioner's petition for rehearing *en banc* is reported at 760 F.2d 87.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 16, 1984. A petition for rehearing was granted, in part, on February 1, 1985, and a timely petition for rehearing *en banc* was denied on May 13, 1985. The petition for certiorari was filed within ninety (90) days of that date. This petition was returned on August 20, 1985 for refiling within 21 days, and was refiled within twenty-one (21) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

United States Code, Title 42, Sec. 2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorneys' fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Petitioner, ANA M. UVIEDO, sued respondent, STEVES SASH & DOOR COMPANY, to enforce her legal rights under Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-5, *et seq.*) in the United States District Court for the Western District of Texas alleging wage and promotion disparate treatment national origin discrimination which led to her constructive discharge, identifying four instances of alleged wage and two instances of alleged promotion discrimination. The district court referred the matter to U.S. Magistrate Giles who,

as special master, recommended that the petitioner be denied all relief.

The trial court, Honorable D. W. Suttle, rejected in part the recommendation of the magistrate and held that its finding of no disparate treatment regarding wages and promotion was clearly erroneous in one instance as to each claim; that respondent, as claimed by petitioner, had, in fact, discriminated against her because of her Hispanic national origin in violation of Title VII, but that respondent's illegal conduct did not result in petitioner's constructive discharge. The district court awarded petitioner $386.00 in back wages, plus $7,500.00 in attorneys' fees, which amount was stipulated to by the parties and approved by the magistrate as reasonable fees for the prevailing party plaintiff. *See, Uviedo v. Steves Sash & Door Company,* 738 F.2d 1425, 1432 n. 10 (5th Cir. 1984)[1] (Uviedo I).

On appeal, the Fifth Circuit Court of Appeals affirmed the district court's finding of wage and promotion national origin discrimination, but reversed the trial court's approval of the parties' stipulated settlement of attorneys' fees, ruling that petitioner was not the prevailing party pursuant to 42 U.S.C. Sec. 2000e-5(k). Although petitioner pled and secured a trial court declaration that respondent was guilty of illegal wage and promotion discrimination, so that petitioner recovered some monetary relief, the court below concluded that she was not the prevailing party, in that she did not prevail on the central issue of the action because she did not obtain the "primary relief sought," i.e., an injunction and the majority of monetary relief alleged. *Uviedo I,* 738 F.2d at 1433.

---

1. The language of the stipulation may be found at 738 F.2d 1425, 1432 n. 10, reproduced at pages 14a-15a, *infra.*

On rehearing, *Uviedo v. Steves Sash & Door Company,* 753 F.2d 369 (5th Cir. 1985) (Uviedo II), the court below reversed its previous attorneys' fee ruling and remanded the case to the district court for findings as to whether petitioner succeeded on any "unrelated claims" and, if so, whether she prevailed on the "central issue" of those *claims,* rather than the action as a whole, and should, therefore, be awarded attorneys' fees for such separate, discrete claims. The court of appeals again rejected the district court approved attorneys' fee settlement on the grounds that the settlement was achieved without petitioner's presenting evidence to support the attorneys' fee litigation standards of *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

On May 13, 1985, the court of appeals denied plaintiff's suggestion for rehearing *en banc,* with six judges dissenting. *Uviedo v. Steves Sash & Door Company,* 760 F.2d 87 (5th Cir. 1985) (Uviedo III).

REASONS FOR GRANTING CERTIORARI

This petition raises a substantial and important question concerning the proper judicial administration of Title VII of the Civil Rights Act of 1964 as to the extent of success a party plaintiff must achieve in order to be "the prevailing party" pursuant to 42 U.S.C. Sec. 2000e-5(k) providing for the award of attorneys' fees. Secondly, this petition should be granted, so that this court may direct lower courts to accept the parties' settlement of the attorneys' fee issue in Title VII cases without requiring a plaintiff to prove the relationship between the amount of the settled fee and the degree of success achieved on the litigated issues of liability and relief.

The United States Supreme Court should rule unequivocally that the prevailing party plaintiff is one who succeeds on any significant issue which achieves some benefit sought in the litigation. To the contrary is the meaning assigned to "the prevailing party" plaintiff by the Fifth Circuit Court of Appeals. The court below held that an employee, as a private attorney general, who pleads and proves that an employer was guilty of employment discrimination in violation of the national policy expressed in Title VII and who vindicates rights protected thereunder, may not recover reasonable attorneys' fees unless she prevails on the central issue of the action as exhibited by the fact that she obtains the primary relief sought. It concludes that petitioner did not prevail on a sufficient number of her claims or win enough back pay to be the prevailing party, as intended by Congress, so as to receive any attorneys' fees.

This "central issue" standard to identify the "prevailing party" is in direct conflict with the standard utilized to determine the prevailing party by the courts of appeal in the District of Columbia, First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth and Federal Circuits. But it is followed, also, by the Sixth and Eleventh Circuits, so that there is no uniformity in the administration of the national policy to eradicate discrimination in employment. Thus, the United States Supreme Court should grant this petition to unify for all circuits the meaning of "the prevailing party" plaintiff.

The opinions below conflict directly with *Hensley v. Eckerhart, supra,* in two particulars. First, by failing to uphold the parties' settlement of the attorneys' fee issue at the trial level, the court below provides "a second

major litigation." 461 U.S. at 437. Second, by requiring a plaintiff to segregate her claims by type and prevail on the central issue of distinct claims to be the prevailing party as to such claims, the court below violates the Supreme Court's specific holding that "[s]uch a lawsuit cannot be viewed as a series of discrete claims. *Id.* at 435. Arguably, it also conflicts with the prevailing party status standard approved by this court. *Id.* at 433.

Finally, the administration of Title VII by the court below frustrates rather than fulfills the underlying purpose of Title VII to encourage private parties and counsel, as private attorneys general, to seek judicial remedies to enforce the Civil Rights Act of 1964. *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968). This purpose is effected by courts awarding attorneys' fees as the general rule. *See, Smith v. Robinson,* 468 U.S.____, 104 S. Ct. 3457, 82 L.Ed.2d 746, 761 (1984); *Newman v. Piggie Park Enterprises, Inc., supra.* Such established congressional policy is thwarted by the court below.

Hence, in the Fifth Circuit, the injured plaintiff whose civil rights are violated may be denied the chance to vindicate those rights because of the legitimate fear that a dispute will arise over what constitutes the central or primary relief, thus undermining the desirable and necessary private attorney general concept. *See, Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240 (1975). The United States Supreme Court should exercise its supervisory powers to review and correct the continuing injustice perpetrated by the position adopted in the Fifth Circuit.

1. **DID THE COURT OF APPEALS ERR IN REFUSING TO ENFORCE THE TRIAL COURT APPROVED SETTLEMENT OF ATTORNEYS' FEES STIPULATED BY THE PARTIES WHERE PETITIONER PLED AND SUCCESSFULLY PROVED WAGE AND PROMOTION NATIONAL ORIGIN DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964?**

ARGUMENT

In *Hensley v. Eckerhart,* 461 U.S. at 437, this court emphasized that "[a] request for attorneys' fees should not result in a second major litigation." This action was tried in February, 1979, yet there still remains unresolved the issue of the entitlement to attorneys' fees and, if so, the legality of the settlement of the amount thereof. The result of the holding of the court below is substantially protracted fee litigation:

> On remand, the district court shall initially determine whether there are any unrelated claims and, if, as appears to be the case, there are, shall then divide the case into different units, each of which will consist of a single claim or a single group of claims each related to the others unrelated to any other in the case. As to each unit separately considered, the court will apply the "central issue" test of *Commonwealth* in determining entitlement to attorneys' fees.

Uviedo II, 753 F.2d at 372-73.

The Fifth Circuit imposes this result notwithstanding its admonition that "[t]hese matters should be addressed

in the first instance by the district court, and its determination in regard thereto will be entitled to substantial deference." *Id.* at 373. The court below disregards rather than defers to the trial court approved compromise and settlement of the fee issue that $7,500 is reasonable if petitioner "wins," i.e., is the prevailing party plaintiff under 42 U.S.C. Sec. 2000e-5(k). *Uviedo I,* 738 F.2d at 1432 n. 10. There can be no serious or sincere contention but that "wins" as used by counsel means "prevailing."[2]

Nevertheless, the court below, after affirming the trial court's ruling on the merits, reversed the trial court's award of attorneys' fees holding the settlement "inapplicable where the suit includes unrelated claims and so is required to be treated under *Hensley* as two or more lawsuits for purposes of eligibility for (and exposure to) attorneys' fees awards." *Uviedo II,* 753 F.2d at 372-73. This new attorneys' fee milieu by the Fifth Circuit for the administration of Title VII civil rights litigation flies in the face of the United States Supreme Court's desire to simplify litigation by settlement and reduce court dockets. *Hensley v. Eckerhart,* 461 U.S. at 437.

Conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes. *Pettway v. American Cast Iron Company,* 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979). A Title VII plaintiff's claim for an award

---

2. Webster's New International Dictionary of the English Language defines "win," as follows:

> 2. To gain victory, in any contest, to be victor; to triumph; *prevail;* succeed. p. 2932 (2d ed. 1953) (Emphasis Added)

To be the "winning party" in an action by an employee for collection of wages and penalties, there is no requirement that penalties, in addition to wages, be recovered. *Keeton v. Rike,* 559 P.2d 262 (Colo. 1977).

of attorneys' fees is as subject to compromise and settlement as any other portion of a Title VII plaintiff's total claim. *See, Hensley v. Eckerhart,* 461 U.S. at 437, *cf., Rainsbarger v. Columbia Glass and Window Company,* 36 FEP Cases, 1303, 1307 (W.D. Mo. 1984). Since a compromise of legal rights is intrinsic to a settlement, *Pettway v. American Cast Iron Pipe Company,* 576 F.2d at 1214, the terms of a settlement may vary from the statutory limits of Title VII. *EEOC v. Safeway Stores, Inc.,* 611 F.2d 795, 799 (10th Cir. 1979). Hence, the parties are free to compromise the dispute by settling between themselves, through a contract, the amount of a reasonable attorneys' fee, regardless of the standard for determining attorneys' fees in disputed cases.

Here, the trial court awarded petitioner fees by approving the stipulated amount. A trial court's award of the amount of such fee as a reasonable fee may not be set aside by a court of appeals except for a clear abuse of discretion. *Phillips v. Smalley Maintenance Services, Inc.,* 711 F.2d 1524, 1530 (11th Cir. 1983); *Van Fossan v. International Brotherhood of Teamsters,* 649 F.2d 1243, 1249 (7th Cir. 1981); *Littlefield v. Deland,* 641 F.2d 729, 733 (10th Cir. 1981); *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344, 1355 (8th Cir. 1980); *Copland v. Marshall,* 594 F.2d 244, 253 (D.C. Cir. 1978); *Gunn v. International House of Pancakes,* 513 F.2d 114, 126 (8th Cir. 1975), *cert. denied,* 423 U.S. 864 (1975); *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717 (5th Cir. 1974).

In the case at bar, the court of appeals made no findings that the trial court abused its discretion in awarding the fees by approving the stipulation. Instead, after con-

cluding that the trial court did not err in finding that respondent violated Title VII, *Uviedo I*, 738 F.2d at 1431-32, and petitioner may be entitled to some award, the court below disregarded the stipulation for failing to comply with the *Hensley* standard, an error that should compel the Supreme Court to grant this petition.

It is only when the *amount* of attorneys' fees is in dispute that the *Hensley* analysis is required, as follows:

> *Where settlement is not possible*, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. (Emphasis added).

Hensley v. Eckerhart, 461 U.S. at 437.

Here, a settlement was made and ultimately approved by the court in its order granting relief. Thus, the *Hensley* analysis is irrelevant. But, instead of simply following the stipulation, the court below incorrectly rejected it and remanded the case to the district court to determine a proper attorneys' fee in accordance with a complex set of instructions which remain subject to future, substantial litigation. To encourage the settlement of attorneys' fees in Title VII disputes, this court should exercise its supervisory power to correct the decision below.

2. WHETHER A TITLE VII PREVAILING PARTY PLAINTIFF IS ONE WHO PLEADS AND SUCCESSFULLY PROVES AN IMPORTANT MATTER IN THE COURSE OF LITIGATION OR, AS HELD BY THE FIFTH CIRCUIT COURT OF APPEALS, ONE WHO IS SUCCESSFUL ON THE CENTRAL ISSUE AS EXHIBITED BY THE FACT THAT HE HAS ACQUIRED THE PRIMARY RELIEF SOUGHT

ARGUMENT

A. The Decisions Below Defeat The Legislative Purposes Of Title VII And Obstruct The Congressional Intent To Award Attorneys' Fees To Private Attorneys General To Enforce Civil Rights Acts.

In order to obtain attorneys' fees in Title VII actions, a plaintiff must be the "prevailing party." 42 U.S.C. Sec. 2000e-5(k). The purpose of the "prevailing party" standard in a Title VII action is parallel to that expressed in the legislative history of the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. Sec. 1988. *Hanrahan v. Hampton,* 446 U.S. 754, 758 (1980); *see, Hensley v. Eckerhart,* 461 U.S. at 433 n. 7. The standards expressed herein are, therefore, applicable to all cases involving an attorneys' fee award to prevailing parties. *Id.*

As to civil rights litigation, Congress has instructed all courts to use the broadest and most effective remedies available to achieve the goals of civil rights laws. S. Rep. 94-1011, 94th Cong., 2d Sess., 3. n. 1 (1976); *see, Smith v. Robinson,* 82 L.Ed.2d at 761. Title VII and other civil rights laws "depend heavily upon private enforcement,

and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain." S. Rep. 94-1011, *supra,* at 2 (1976).

The attorneys' fees provision of Title VII is, therefore, designed to "make it easier for a plaintiff of limited means to bring a meritorious suit," *Christiansburg Garment Company v. EEOC,* 434 U.S. 412, 420 (1978), *quoting* Remarks of Senator Humphrey, 110 *Cong. Rec.* 12724 (1964). For:

> [n]ot to award counsel fees in cases such as this would be tantamount to repealing the act itself by frustrating its basic purpose * * * Without counsel fees the grant of federal jurisdiction is but an empty gesture * * * *Hall v. Cole,* 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2nd Cir. 1972).

S. Rep. 94-1011, *supra,* at 3. Therefore, parties seeking to enforce their Title VII rights "should ordinarily recover an attorneys' fee unless special circumstances would render an award unjust." S. Rep. 94-1011, *supra,* at 4, *quoting, Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968).

The prevailing party test adopted by the Fifth Circuit below violates the above underlying purposes and congressional intent for civil rights act enforcement. It requires, in order for a private attorney general to recover *any* fee, that the plaintiff prevail on the central issue of the action as exhibited by obtaining the primary relief sought. This standard discourages the private vindication of civil rights violations since attorneys know they must first obtain the primary relief sought before receiving any compensation. This is contrary to the congressional con-

cept that when one prevails on an important matter of litigation "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises,* 390 U.S. at 402.

Congress therefore deemed attorneys' fee awards appropriate when a party has prevailed "on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." S. Rep. 94-1011, *supra,* at 5, *citing, Bradley v. School Board of the City of Richmond,* 416 U.S. 696 (1974) and *Mills v. Electric Autolight Company,* 396 U.S. 375 (1970). Therefore, Congress intended that parties should be considered to have prevailed when they vindicate any rights even without formally obtaining all relief. S. Rep. 94-1011, *supra,* at 5.

Congress expressed some fear that a restrictive meaning such as that adopted by the Fifth Circuit would be attached to the term "prevailing party." As stated in the House Report:

> Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating lawsuits. The committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under federal law. In light of existing case law under similar provisions, however, the committee concluded that the application of current standards to this bill will significantly reduce the potential adverse effect on the victims of unlawful conduct who seek to assert their federal claims.

H. Rep. 95-1588, 94th Cong., 2d Sess., 5 (1976). Toward this end, Congress concluded that an award of

attorneys' fees should be the rule and not the exception, citing for support, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The fee system adopted by Congress is designed to enable the "vigorous enforcement of modern civil rights legislation. . . ." S. Rep. 94-1011, *supra*, at 4.

> If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. 94-1011, *supra*, at 2. Yet, in effect, the standard adopted by the Fifth Circuit reverses, *sub silencio*, *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*). Particularly, the court below holds exactly the opposite to the panel, whose opinion was affirmed:

> To hold that a plaintiff could not prevail for purposes of attorneys' fees and costs if he succeeded in recovering for fewer than half of the claims made in his complaint would be inconsistent with our liberal pleading rules and would penalize aggrieved parties for covering all bases at the initiation of the suit.

Jones v. Diamond, 594 F.2d 997, 1026 (5th Cir. 1979), *affirmed on rehearing en banc*, 636 F.2d 1364 (5th Cir. 1981).

The central issue standard forces attorneys to choose the claims easiest and most likely proven instead of vigorously arguing *all* valid claims that a client may have. As previously concluded by the Fifth Circuit (*en banc*):

> In fixing the fee, the district court should be mindful that in complex civil rights litigation, . . . issues are overlapping and intertwined. In order to represent their clients adequately, attorneys must *explore* fully *every aspect* of the case, *develop all* of the *evidence* and *present* it *to* the *court*. Time spent pursuing unsuccessful claims that were clearly without merit should be excluded. However, the mere fact that litigants did not succeed in obtaining a judgment on all of the claims asserted *does not mean* that time spent pursuing these claims should be automatically disallowed. (Emphasis added).

Jones v. Diamond, 636 F.2d at 1382.

The prevailing party standard, therefore, is precisely that which applies to Rule 54 of the Federal Rules of Civil Procedure, as follows:

> [A] party in whose favor a judgment is rendered by the district court is the prevailing party. . . . Although a plaintiff may not sustain his entire claim, if judgment is rendered for him[,] he is the prevailing party.

6 *Moore's Federal Practice*, Sec. 54.70[4], 1306-07 (1984).

This Court should exercise its supervisory power to bring the Fifth Circuit standard for awarding attorneys' fees into conformity with the Congressional intent and purpose.

B. The Decisions Below Conflict With Decisions Of Other Courts Of Appeal As To The Proper Threshold For Awarding Attorneys' Fees To A Prevailing Party Plaintiff Under 42 U.S.C. Sec. 2000e-5(k).

Every circuit court of appeals that has considered who is the prevailing party plaintiff since *Hensley v. Eckerhart* has adopted the "any significant issue" test except the Fifth, Sixth and Eleventh Circuits, *Uviedo v. Steves,* 760 F.2d 87 (5th Cir. 1985, *on suggestion for rehearing en banc*) (Rubin, dissenting); *Miami Herald Publishing Company v. City of Hallandale,* 742 F.2d 590, 591 (11th Cir. 1984); *Kentucky Association for Retarded Citizens, Inc. v. Conn,* 718 F.2d 186 (6th Cir. 1983), which have adopted the central issue test.

In *Hensley v. Eckerhart,* this court cited with approval the First Circuit's prevailing party plaintiff standard as follows:

> plaintiffs may be considered "prevailing parties" for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.

461 U.S. at 433, *quoting, Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978). Since then, ten other circuits have adopted the *Nadeau* standard. *Environmental Defense Fund, Inc. v. EPA,* 716 F.2d 915 (D.C. Circuit 1983); *Gingras v. Lloyd,* 740 F.2d 210, 212 (2nd Cir. 1984); *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897 (3rd Cir. 1985); *Lotz Realty Company v. U.S. Department of Housing,* 717 F.2d 929 (4th Cir. 1983); *Mary Beth G. v. City of*

Chicago, 723 F.2d 1263 (7th Cir. 1983); *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218 (8th Cir. 1984); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124 (9th Cir. 1983); *In Re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 611 (10th Cir. 1984); *Austin v. Department of Commerce*, 742 F.2d 1417 (Fed. Cir. 1984).

Particularly, in *Lummi Indian Tribe v. Oltman*, 720 F.2d at 1125, the Ninth Circuit considered that the United States Supreme Court *held* that the "significant issue" test was *the standard* for awarding attorneys' fees in a case such as the one at bar, as follows:

> . . . In *Hensley*, the Supreme Court held that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any* significant issue in litigation which achieves *some* of the benefit which the parties sought in bringing suit." . . . (Emphasis added).
>
> *Hensley* approves a generous standard for determining when a plaintiff is a "prevailing party." The extent of the plaintiff's success is considered only in determining the amount of the award. ____U.S. at ____, 103 S. Ct. at 1942, 76 L.Ed.2d at 54.

There is, therefore, stark conflict among the circuits resulting in pronounced geographic disparity in the administration and enforcement of the nation's civil rights laws. The conflict should be resolved by this court to insure continued effective uniform enforcement of national policy. *Cf., Scott v. Immigration and Naturalization Service*, 358 U.S. 214 (1966).

C. The Decisions Below Conflict With Decisions Of The Supreme Court Regarding Entitlement To Attorneys' Fees Under 42 U.S.C. Sec. 2000e-5(k).

The central issue test for entitlement to any fee, adopted by the court below, unduly restricts the award of attorneys' fees to party plaintiffs who win on the main issue or who obtain the "primary relief." Although prevailing parties "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402, the standard below effectively bars partially successful plaintiffs, such as petitioner, from recovering any fees. The test below fails in three respects. First, it unlawfully raises the threshold determination; second, it improperly segregates multiple claims; and third, it impermissibly denies recovery for unsuccessful claims.

The standard for the threshold question of whether a plaintiff is the prevailing party to recover any attorneys' fees was defined by the United States Supreme Court in 1983, as follows:

> . . . plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation and which achieves some of the benefit the parties sought in bringing suit. . . . This is a generous formulation that brings the plantiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

Hensley v. Eckerhart, 461 U.S. at 433. The Fifth Circuit *Uviedo* "prevailing party" standard is different.

Rather than providing a "generous" threshold through which a prevailing party plaintiff may pass for entitlement to any fee, the Fifth Circuit presents many narrow doorways to select and through which the plaintiff must squeeze in order to be entitled to fees, as follows:

> On remand, the district court shall initially determine whether there are any unrelated claims and, . . . shall then divide the case into different units, each of which will consist of a single claim (or a single group of claims each related to the others) unrelated to any other in the case. As to each such unit separately considered the court will apply the "central issue" test of *Commonwealth*. In determining entitlement to attorneys' fees.

Uvedo II, 753 F.2d at 773.

This prevailing party standard not only violates the *Hensley v. Eckerhart* threshold issue standard, but also violates the admonition of the supreme court that a civil rights lawsuit cannot be viewed as a series of discrete claims. 461 U.S. at 435. The court below confuses the standard for entitlement to any fee with the standard for determining what is a reasonable fee once a plaintiff has passed through the generous threshold. Further, it considers the Title VII action as a series of discrete claims by imposing a related-unrelated claims test for entitlement rather than for the amount of the fee. Even though all of petitioner's wage and promotion claims shared a "common core of facts," the Fifth Circuit attempted to segregate these claims as to time rather than substance relating to respondent's continuing attitude of discrimination based upon petitioner's national origin. *See, Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (7th Cir. 1983).

Generally, claims for relief as to attorneys' fee are loosely defined "in terms of grounds or theories of recovery or in terms of particular 'wrongs' bottomed on the same legal theory." *Id.* at 1279 n. 15. Under such usage, the court below erred by dividing the claims in terms of periods of employment. The claims are related by common facts and common legal theories, that is, they all relate to a single employer systematically engaged in wage and promotion national origin discrimination against petitioner. As her unsuccessful claims were related to the successful ones by this common core of facts and common legal theories regarding respondent's illegal course of conduct, she is entitled to reasonable attorneys fees on all claims. This reasonable concept should be emphasized by this Court, so that Title VII litigation will not result in a second major litigation over fees. *Hensley v. Eckerhart,* 461 U.S. at 437.

The standard adopted by the Fifth Circuit surely results in a second major litigation because of the requirement that a party plaintiff must identify related and unrelated claims arising from the same common core of facts, divide the case into different units of claims and then prove that he prevailed on the central issue of each separate, discrete claim. A prevailing party plaintiff prevails on each successful, unrelated claim to each unsuccessful, related claim, rather than a consideration of the litigation as a whole. *Uviedo II,* 753 F.2d at 372-73. Such blatant judicial legislation in derogation of legitimate legislative purposes and specific congressional intent should be addressed by the United States Supreme Court.

CONCLUSION

This court should exercise its supervisory power to correct the opinion of the Fifth Circuit Court of Appeals in order to facilitate the private settlement of attorneys' fee issues, and to provide for a uniform standard of awarding attorneys' fees consistent with the spirit of our nation's civil rights laws.

Respectfully submitted,

MENDELSOHN, HEIDELBERG & BEER, INC.
1010 InterFirst Plaza
San Antonio, Texas 78205
(512) 222-2271

By: _____
LESLIE STEPHEN MENDELSOHN

APPENDIX I

Ana M. UVIEDO,
Plaintiff-Appellee,

v.

STEVES SASH & DOOR COMPANY,
Defendant-Appellant.

No. 83-1415.

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1984.

In a Title VII disparate treatment case, defendant employer appealed from judgment of the United States District Court for the Western District of Texas at San Antonio, Dorwin W. Suttle, J. The Court of Appeals, Garwood, Circuit Judge, held that: (1) where employer, as to count for discrimination in promotion, never artculated to magistrate that various possible explanations for particular challenged action were in fact the reasons therefor, employer failed to rebut presumption arising from establishment of prima facie case, and (2) employer's statement to plaintiff that other employees had been there longer or were performing different jobs, although such statement was quite general, might have been sufficient under certain circumstances, but was not under circumstances of case at bar in view of fact that statement by employer representative did not even purport to apply to promotion situation with respect to which plaintiff was complaining.

Affirmed in part and reversed in part.

Jerre S. Williams, Circuit Judge, filed specially concurring opinion in which Thornberry, Circuit Judge, joined.

George P. Parker, Theo. F. Weiss, San Antonio, Tex., for defendant-appellant.

Les Mendelsohn, Barry H. Beer, San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

In this Title VII disparate treatment case, a magistrate acting as special master found in favor of the defendant-employer. The district court rejected the magistrate's recommendations in part, finding in favor of the plaintiff, Ana Uviedo, on one claim of wage discrimination and one claim of denial of promotion. The district court also awarded the plaintiff $7,500 in attorneys' fees. Defendant appeals. We affirm the district court's judgment on the substantive claims, but reverse the award of attorneys' fees.

I.

FACTS

Ana Uviedo worked for Steves Sash & Door Company ("Steves" or "the Company") for a total of about twenty-eight months over a four-and-one-half-year period. She first began working for the Company on August 5, 1968

in the accounting and payroll section for a salary of $1.75 an hour. About eighteen months later, in February 1970, after her pay had increased to $1.95 an hour, she voluntarily left her employment.

Apparently finding Mrs. Uviedo to be a competent employee, the Company recalled her on several occasions to fill in temporarily for other employees, and in December 1971 asked her to return to work in the position of personnel clerk. She accepted and began work in January 1972. Problems quickly followed, however. Mrs. Uviedo learned that her predecessor, an Anglo female who had less overall tenure with Steves, had earned $2.35 an hour; Mrs. Uviedo was receiving only $2.00 an hour. In addition, she believed that she was being given more and more difficult work, including accounting tasks, than given her predecessor. As a result, she resigned in February after having performed the job for about a month. She filed a complaint with the EEOC almost immediately thereafter, alleging that she was being discriminated against in pay and other conditions of employment because of her national origin, Hispanic.

In April 1972, however, the Company again asked Mrs. Uviedo to return to work, this time as a purchasing clerk at a rate of $2.25 an hour. Again she accepted. Three months later, Steves, through its controller, Robert Abright, offered Mrs. Uviedo the job of personnel clerk. She agreed to take the position but requested an increase of 25 cents an hour to do so. Abright countered with an offer of a 10-cent-an-hour increase, but Mrs. Uviedo stated that this would not be sufficient. Abright then indicated that he would see what he could do. He failed to speak with Mrs. Uviedo about the position again, however, and in August the Company recalled Nancy

Gibbon, another former employee of Steves, to fill the position offered Ana Uviedo; Mrs. Gibbon's pay was $2.65 an hour.

Mrs. Uviedo continued working for Steves and in January 1973 the Company placed her in the accounts payable position. On January 11, 1973 she informed Michael Cox, who had replaced Abright as controller, that she would resign if her pay was not increased to $2.75 an hour. She was told that no raise would be given. She then gave two weeks' notice. On January 17, 1973, however, she learned that another employee, an Anglo female, had received a pay increase. Upset by what she perceived as another discriminatory action by Steves, Mrs. Uviedo quit her job that same day. She again complained to the EEOC.

Following receipt of her right to sue letter from the Commission, Mrs. Uviedo initiated this lawsuit in the federal district court under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981 and 1985 in April 1977. She alleged that her employer had discriminated against her because of her national origin by denying her promotions, by paying her less than Anglo females for the same work, and by constructively discharging her. In July 1978 the district court referred the case to a United States magistrate as special master. Following an evidentiary hearing the magistrate, in May 1979, issued findings and recommended that the plaintiff be denied any relief and that judgment be rendered for the defendant. Mrs. Uviedo filed objections to the magistrate's findings and recommendations and in August 1983 the district court entered its order rejecting in part these recommendations. The district court found that the defendant's reasons for the difference in wages

paid to Mrs. Uviedo and to a co-worker, Elaine Fisher, were pretextual and awarded her $98 in back pay. The court also found that the defendant failed to present any evidence regarding the Company's failure to promote plaintiff to the position of personnel clerk, awarding her $288 in back pay for this claim. Finally, the district court awarded the plaintiff attorneys' fees in the amount of $7,500. The court, however, accepted the magistrate's finding that the Company did not constructively discharge Mrs. Uviedo or discriminate against her with respect to her other wage and promotion claims. On appeal, the defendant-employer challenges the award of attorneys' fees and the findings of discrimination on the promotion claim and the wage discrimination claim.[1]

II.

STANDARD OF REVIEW

We review the factual findings of the magistrate acting as special master under the clearly erroneous rule, the same standard applied by the district court. *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 319-20 (5th Cir. 1981); *Matter of Multiponics, Inc.*, 622 F.2d 709, 722 (5th Cir. 1980). Thus, we can affirm the district court's action partially rejecting the magistrate's recommendation only if our review leaves us "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948). The clearly erroneous rule applies not only to the magistrate's subsidiary findings but also to his ultimate finding

1. The plaintiff attempted to cross-appeal the denial of her constructive discharge claim but failed to file a timely notice of cross-appeal.

respecting discriminatory intent. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982); *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1053 (5th Cir. 1984).

III.

PROMOTION CLAIM

To establish a *prima facie* case of disparate treatment in promotion, a plaintiff must show: (1) membership in a protected group; (2) an application for an open job for which he or she was qualified; (3) rejection; and (4) action by the employer in promoting or hiring a nonminority for the job or in continuing to seek nonminority applicants for that job. *Page*, 726 F.2d at 1055; *McDonnell-Douglas v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Once a plaintiff has established a *prima facie* case, the defendant must articulate a nondiscriminatory reason for failing to promote the plaintiff. If the defendant does so, the plaintiff then may attempt to show that the defendant's reasons are pretextual. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). The burden of persuasion remains at all times on the plaintiff. *Id.* at 253, 256, 101 S. Ct. at 1093, 1095.

The magistrate generally found that Ana Uviedo, "[t]aking the evidence presented by the plaintiff in its most favorable light," had made a *prima facie* case. He also found, however, that the defendant had rebutted Mrs. Uviedo's *prima facie* case and that she had failed to show that the "reasons articulated by defendant for not promoting her . . . were merely a pretext." The

district court rejected the magistrate's finding of no discrimination with respect to Mrs. Uviedo's nonpromotion to the personnel clerk job in July 1972, finding that the defendant failed to come forward with any nondiscriminatory reason for not promoting her.

[1] Appellant contends that the district court was wrong for several reasons. First, it argues that Mrs. Uviedo was not denied a promotion and thus, contrary to the magistrate's finding, did not make a *prima facie* case because she turned down the position when Abright offered it to her. For this reason, Steves argues, this court should view the issue not as one involving a denial of promotion but rather as one concerning a disparity in wages.[2] We reject this argument. Although the magistrate found, and the record shows, that Abright offered the job initially to Mrs. Uviedo, the magistrate also found that Abright never responded to her request for a 25-cent raise and that she heard no more about the position until learning of Nancy Gibbon's appointment. Thus, the record does not reflect that Mrs. Uviedo rejected the position. More importantly, she certainly did not reject a position paying $2.65 an hour, the position awarded

---

2. Steves compares Mrs. Uviedo's situation to that faced by a plaintiff who alleges constructive discharge due to wage discrimination. We have held in such cases that wage discrimination alone does not provide a grounds for a constructive discharge, reasoning that the plaintiff should instead pursue her Title VII remedy for the discrimination in pay. *See, e.g., Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 66 (5th Cir. 1980); *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981). In the same way, defendant argues, Mrs. Uviedo's only option was to take the job and then complain later about any pay disparity. This argument is mistaken. In these cases, the plaintiffs, unlike Mrs. Uviedo, had a present remedy but chose not to pursue it.

Mrs. Gibbon and the basis for Ana Uviedo's claim.[3] The magistrate's finding of a *prima facie* case was not clearly erroneous.

[2, 3] Appellant next argues that the record is replete with nondiscriminatory reasons for selecting Nancy Gibbon for the position and for paying her more than either offered or sought by Mrs. Uviedo. Appellant points out that Mrs. Gibbon, though not employed by the Company at the time Abright approached Mrs. Uviedo about the personnel clerk position, had overall greater tenure with Steves; she had worked for the Company for about a total of fifty-two months in comparison to plaintiff's approximately twenty-three months of cumulative service. In addition, appellant points to testimony reflecting that Mrs. Gibbon had more prior experience than Mrs. Uviedo in the position of personnel clerk at Steves and to documentary evidence showing that she had received wage increases during Mrs. Uviedo's absence from the Company. It is certainly possible that these facts could be legitimate reasons for promoting one employee over another or for paying one employee more than another. The difficulty here, however, is that defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged action. The issue in

---

3. Thus the cases cited by appellant involving employees who have turned down a job and then later claimed that they were denied a promotion are not on point. Moreover, even if we were to consider that Mrs. Uviedo in some sense "rejected" the position, we must still address the central issue: why the employer was willing to pay an Anglo female a higher salary than a minority female for the same position. Steves' willingness to pay Mrs. Gibbon $2.65 an hour to perform the duties of the personnel clerk negates any inference that the pay rate sought by Ana Uviedo—$2.50 an hour—was more than the intrinsic value of the job. The issue then must be why the Company treated these two individuals in a different manner.

a disparate treatment case is whether a defendant had a discriminatory intent. *Page,* at 1045. Establishment of a *prima facie* case creates a presumption that an employer did unlawfully discriminate. *Burdine,* 450 U.S. at 254, 101 S. Ct. at 1094. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* Appellant argues, however, that it was not required to offer rebuttal evidence because plaintiff's own witnesses offered the reasons for the Company's decision to promote Mrs. Gibbon instead of Mrs. Uviedo. To support this assertion, appellant cites cases in which courts have held that a defendant is under no obligation to present evidence through its own witnesses where the plaintiff's witnesses have offered evidence supporting the defendant's nondiscriminatory reasons. *See, e.g., Lewis v. Brown & Root, Inc.,* 711 F.2d 1287 (5th Cir. 1983), *cert. denied,* ____U.S.____, 104 S. Ct. 975, 79 L.Ed.2d 213 (1984); *Nulf v. International Paper Company,* 656 F.2d 553, 560 (10th Cir. 1981). Appellant misperceives the holding of these cases and their application here. In this court's decision in *Lewis* for example, the plaintiff, who was claiming racial discrimination, clearly stated that his failure to be reemployed was due to a *personal* grievance between him and another individual and that, in discharging him, his supervisor was doing what was best for him to do as a superior. Plainly, he offered his employer's nondiscriminatory reasons for these actions.

[4] Here, by contrast, Mrs. Uviedo did not testify that the defendant failed to promote her for reasons other than her national origin. Nor did any of her witnesses so testify. What appellant relies on is instead testimony by Mrs.

Gibbon in response to general background questions by the plaintiff's counsel regarding the dates of her employment, etc. The record does not reflect that appellant followed up on this testimony during cross-examination or that it ever attempted to develop this evidence in any manner as supporting its actions. The burden on the defendant in rebutting a plaintiff's *prima facie* case is not a heavy one. "All the employer need do is to raise a genuine issue of fact as to whether it discriminated against the plaintiff." *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1385 (5th Cir. 1983). The defendant accomplishes this by introducing into evidence "a clear and reasonably specific legally sufficient explanation" for its action. *Id. See Burdine*, 450 U.S. at 254-55, 101 S. Ct. at 1094-95. This the defendant failed to do. It is beyond the province of a trial or a reviewing court to determine—after the fact—that certain facts in the record might have served as the basis for an employer's personnel decision.[4] Thus, we hold that the magistrate

4. The cases cited by appellant, including *Lewis* and *Nulf*, do not persuade us to the contrary. For the most part, these cases involve Rule 41(b) dismissals by the court following the plaintiff's case. *See, e.g., Holden v. Commission Against Discrimination, etc.*, 671 F.2d 30 (1st Cir.), *cert. denied*, 459 U.S. 843, 103 S. Ct. 97, 74 L.Ed.2d 88 (1982); *Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1980); *Sime v. Trustees of the California State University and Colleges*, 526 F.2d 1112 (9th Cir. 1975). In each case, the plaintiff claimed that he or she had made a *prima facie* case and expected that the defendant would articulate reasons during its case, which reasons the plaintiff would then show to be pretextual. *See Holden*, 671 F.2d at 36. While these cases reject a rigid three-step process for the burden of proof in Title VII cases, they do not alter the requirement that the defendant articulate a clear reason for its action. Rather, they reflect that the reasons can be stated during the plaintiff's case either through adverse witnesses, documentary evidence, or express statements by the plaintiff, such as in *Lewis*. As the First Circuit has stated:

"In determining the propriety of a Rule 41(b) dismissal of

could not have relied on the evidence regarding Mrs. Gibbon's tenure to support his finding of nondiscrimination, since there was no evidence that this was the reason for the complained of action.

[5] Finally, appellant argues that it did rebut any *prima facie* case made by Mrs. Uviedo through a statement by Monroe Voight, vice president and general manager of Steves. Voight stated that in response to complaints by Mrs. Uviedo about pay differences with other employees, he told her that the other employees had been there longer or were performing different jobs. This statement, although quite general, might be sufficient under certain circumstances; it is not here. In this case, Mrs. Uviedo confronted her employer with her dissatisfaction in the salary offered for this particular job for which it had selected her. Thus, unlike many cases in which an employee makes a claim of wage disparity, the Company was aware of Mrs. Uviedo's concern before making its decision, which was a particularized one. A general policy statement regarding pay, without evidence that it was related to this particularized decision, is of only the most attenuated relevance. Moreover, the statement by Voight did not even purport to apply to the promotion situation. Rather, it was made in response to a question regarding what Voight *told Mrs. Uviedo* when she compared herself to other employees. There is no suggestion of any legitimate reason why rebuttal evidence related to this specific decision would not be available to Steves. Under all these

---

a Title VII claim, the question is whether plaintiff had notice of defendant's stated reasons for dismissal and an opportunity to demonstrate their pretextual character." *Holden*, 671 F.2d at 36.

See also Ekanem v. Health & Hospital Corporation of Marion City, Indiana, 724 F.2d 563 (7th Cir. 1983).

circumstances, the general statement by Voight does not suffice to rebut Mrs. Uviedo's *prima facie* case.

[6] We agree with the district court that appellant failed to rebut Mrs. Uviedo's *prima facie* case. Moreover, we find clearly erroneous the magistrate's ultimate finding of nondiscrimination with respect to the defendant's failure to promote the plaintiff. Accordingly, we affirm the district court's determination.[5]

IV.

WAGE DISCRIMINATION CLAIM

The magistrate also found that "the plaintiff's failure to receive raises . . . on an equal basis with the other employees was not related to her national origin." The district court agreed with the magistrate on three of Mrs. Uviedo's claims of wage discrimination, but rejected this finding as to one of her claims, that comparing her pay as personnel clerk to the pay received by her predecessor, Elaine Fisher. Appellant challenges the district court's decision and contends that the magistrate's finding as to this particular claim was not clearly erroneous. We agree with the district court.

[7] To establish a *prima facie* case of discrimination respecting compensation a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is

---

5. In so doing we note that the district court in making its determination relied in part on a finding by the magistrate that Abright told Nancy Gibbon "he did not wish to hire any more Mexican-American ladies." Although the magistrate also found that the defendant, in spite of this statement, continued to hire Mexican-Americans, this expression by Abright further supports a finding of discriminatory motive in his actions regarding the nonpromotion of Mrs. Uviedo.

paid less than a nonmember for wrok requiring substantially the same responsibility. *Pittman v. Hattiesburg Municipal Separate School District,* 644 F.2d 1071, 1074 (5th Cir. 1981); *Plemer v. Parsons-Gilbane, Inc.,* 713 F.2d 1127, 1137 (5th Cir. 1983). The analysis is the same even where the two employees whose salaries are being compared are employed at different times in the same position. *Pittman; see also Bourque v. Powell Electrical Manufacturing Company,* 617 F.2d 61, 64 (5th Cir. 1980) (comparison of salary to plaintiff's predecessor). The issue in this case is whether Ana Uviedo and Elaine Fisher were in fact performing substantially the same job.[6] Appellant contends that they were not.

[8] In its analysis of this claim, the district court noted that the magistrate specifically found that the "plaintiff returned to defendant's employ in the personnel department at $2.00 per hour where she succeeded Elaine Fisher who had been paid $2.35 per hour." Appellant argues that the district court misinterpreted the word "succeeded" as meaning that Mrs. Uviedo took over the same job performed by Elaine Fisher. In support of this argument, appellant points to testimony by one of Mrs. Uviedo's own witnesses, Maria Villanueva, who stated that Ana Uviedo was performing accounting, not personnel, work while she (Villanueva) was there. We find Mrs. Villanueva's testimony in this regard to be of little probative value. As the magistrate noted in his statement

---

6. The only justification offered by Steves for differences in compensation were (1) that the plaintiff was doing different work from those with whom she was comparing herself, or (2) that the other individuals had been working for the defendant a longer period of time. It is undisputed that Elaine Fisher who first started to work for the defendant in August 1971, at the rate of $2.35 an hour, had *less* tenure than Mrs. Uviedo.

of the case, this witness also testified that she was not really familiar with the duties of Elaine Fisher. Moreover, there is no dispute that Mrs. Uviedo was performing some accounting duties; her contention was, however, that she was performing the duties of personnel clerk at the same time.[7] It would be incongruous to find that Mrs. Uviedo was indeeed doing the work of the personnel clerk position but that she was foreclosed from a wage discrimination claim because she was also performing other additional tasks. More importantly, whatever conflict there may be in the record,[8] the magistrate found that Ana Uviedo succeeded Ms. Fisher. We do not accept appellant's argument that the magistrate intended something other than the plain meaning of this word. Nor do we find that the magistrate's fact-finding on this issue is sufficiently ambiguous to require a remand.[9]

V.

ATTORNEYS' FEES

During the hearing before the magistrate, the parties stipulated that $7,500 would be reasonable attorneys' fees for the successful party.[10] Based on this stipulation, the

---

7. By the same token, we find that the testimony of Nancy Gibbon that Mrs. Uviedo was performing the personnel job is also of little probative value. Mrs. Gibbon was not employed by the Company during the time Ana Uviedo performed that job.

8. It is not our task as a reviewing court to resolve factual disputes.

9. In addition, we find it significant that the defendant never stated who was performing the personnel duties if Mrs. Uviedo was not doing so during this time.

10. The stipulation was expressed as follows:

"MR. MENDELSOHN: The stipulation is that if the Plaintiff wins in this case and if there are pleadings to support the

district court, stating that Mrs. Uviedo "is the prevailing party,"[11] awarded her the full $7,500 amount. We reverse the award.

[9] As a threshold for recovering attorneys' fees, one must demonstrate that he is the prevailing party; this is plain both from the "unequivocal language of § 706(k)" and "decisional authority." *Commonwealth Oil Refining Co., Inc. v. E.E.O.C.*, 720 F.2d 1383, 1385 (5th Cir. 1983), *rehearing en banc denied*, 734 F.2d 1479 (5th Cir. 1984). *Commonwealth Oil* provides this court's most recent statement of the test for determining whether this threshold requirement has been satisfied. "The proper focus is whether the plaintiff has been successful on *the central issue* . . . as exhibited by the fact that he has acquired *the primary relief sought*.' "[12] *Id.* at 1385, quot-

---

granting of attorney's fees, we have agreed that the reasonable amount of attorney's fees we will be entitled to is $7500. On the other hand, if the Defendant wins and if the Court, based on the pleadings and evidence, feels that this is the kind of suit that would warrant attorney's fees being paid to the Defendant and if they have support for it, likewise a reasonable amount would be $7500, but the Defendant would have to consider the pleadings. I'm sorry. I mean the Court would have to consider them."

11. Section 706(k) of Title VII provides that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . . "

12. The Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983), preceded *Commonwealth Oil* and was, in fact, discussed in the latter. Thus, *Hensley*, which requires the computation of attorneys' fees based on the measure of success achieved, did not change the rule applied in this circuit for determining who has prevailed in a civil rights action. We acknowledged in *Commonwealth Oil* that this rule is less generous than that applied in the First, Seventh, and Ninth Circuits and discussed in *Hensley*. 720 F.2d at 1383 n. 2. In these circuits, a plaintiff may be considered to have prevailed if he

ing *Iranian Students Ass'n v. Edwards,* 604 F.2d 352, 353 (5th Cir. 1979). The court in *Commonwealth Oil* further described the test in these words:

> "In many if not most *lawsuits,* whether tried or settled, it is possible to compare the allegations made with the results obtained and pick out *a winner:* a plaintiff who carried the day on his major claim, a defendant who defeated the major thrust *of the suit.* In other cases it may be that neither party could fairly be said to have carried the day, and in such event there should be no fee award to either." *Id.* at 1385-86 (footnote omitted) (emphasis added).

[10] Applying this test, we find that Mrs. Uviedo did not prevail on her claim for purposes of attorneys' fees under Title VII. She succeeded on only one of four disparate wage claims and on one of two claims alleging denial of promotion. She lost on her claim of constructive discharge which, based on the magistrate's summation and the amount of relief sought, appears to be the central issue in her suit. She asked for injunctive and declaratory relief; she received neither. In addition, of the approximate $48,000 in damages sought, she has received only $386 plus interest. Appellant is correct in asserting that one does not have to receive all or nearly all the relief

---

succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.,* citing *Hensley,* 103 S. Ct. at 1939 n. 8. Nor does *Adams v. Reed,* 567 F.2d 1283 (5th Cir. 1978), suggest a different standard. In *Adams* this court indicated that a plaintiff who won on her retaliation claim but lost on her main claim—discrimination based on sex—was nevertheless "sufficiently successful" to be considered a prevailing party. *Id.* at 1288. This statement was dictum, however, as the court in *Adams* affirmed the district court's denial of attorneys' fees. The test for determining prevailing party status was not at issue.

one seeks to be considered a prevailing party. However, under *Commonwealth Oil* a greater measure of success in the context of the suit as a whole is necessary than that achieved by plaintiff here. We do not, of course, intend to disparge the success, discretely considered, that Mrs. Uviedo has achieved. Certainly she has shown that there was merit to some of her contentions. But she has not shown merit in most of them, or in the most important of them, or in any that could fairly be described, singly or collectively, as the central issue in this case. We simply hold that under the law of this circuit, she was not "*the* prevailing party" in this lawsuit for the purpose of receiving attorneys' fees.[13]

Therefore we affirm the district court's findings regarding discrimination in compensation and promotion. We reverse, however, the award of attorneys' fees to the plaintiff.

AFFIRMED in part and REVERSED in part.

---

13. Because of our resolution of this issue we need not decide whether the stipulation required the district court to award the full $7500 fee amount to Mrs. Uviedo or whether the court should rather have apportioned the award according to *Hensley*. Steves does not challenge the amply supported determination of the magistrate that Steves is not entitled to attorneys' fees under the *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978), criteria applicable to such awards against plaintiffs.

JERRE S. WILLIAMS, Circuit Judge, with whom THORNBERRY, Circuit Judge, joins, concurring specially:

We concur in the result. We feel that we are bound by the decision of this Court in *Commonwealth Oil Refining Co., Inc. v. EEOC,* 720 F.2d 1383 (5th Cir. 1983), in which this Court denied rehearing en banc, 734 F.2d 1479 (5th Cir. 1984). The emphasis in that case upon the "central issue" and obtaining the "primary relief sought" is binding upon us. We emphasize that we feel this requirement is not made necessary by the Supreme Court's decision in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983), and indeed may well be contrary to the import of that case. We feel that in *Commonwealth* the Fifth Circuit adopted an unduly restrictive rule with respect to recovery of attorney's fees in a Title VII case, as Judge Tate effectively pointed out in his dissenting opinion. *Id.* at 1386. The *Hensley* decision specifically recognized without disapproval the more "generous formulation" of the right to receive attorney's fees in such cases as *Nadeau v. Helgemoe,* 581 F.2d 275, 278 (1st Cir. 1978); *Busche v. Burkee,* 649 F.2d 509, 521 (7th Cir. 1981), *cert. denied,* 454 U.S. 897, 102 S. Ct. 396, 70 L.Ed.2d 212; *Sethy v. Alameda County Water District,* 602 F.2d 894, 897 (9th Cir. 1979).

What should control the awarding of attorney's fees in this case is the recognition that Ana Uviedo brought suit under Title VII claiming several instances of discrimination based upon national origin. She failed to establish some of those instances, but she was successful in establishing others. It follows inescapably we have a case in which Title VII national origin discrimination has been

established. And yet because of the unduly restrictive rule of this Circuit we are denying any attorney's fees to this victim of discrimination who successfully proved that the defendant had engaged in Title VII discrimination against her. While this seems to be the law of this Circuit, it should not be the law of this Circuit. In effect we are abandoning our general rule of liberality in pleading. Fed. R. Civ. P. 8(f); 2A Moore's Federal Practice ¶¶ 8.13, 8.34. We are saying that the plaintiff must lose because she undertook to prove too much. If she had based her suit solely upon the instances of discrimination she successfully proved, she would recover attorney's fees without question.

The law is well established in civil rights cases that attorney's fees are properly awarded to a plaintiff even though the actual monetary damages growing out of the violation of civil rights are small or even nominal. The principle was well stated in *Perez v. University of Puerto Rico,* 600 F.2d 1, 2 (1st Cir. 1979):

> The award of counsel fees is not intended to punish the defendant in any way. Rather it is to permit and encourage plaintiffs to enforce their civil rights. To declare those rights while simultaneously denying the award of fees would seriously undermine the declared congressional policy. Fees may not be denied simply because only nominal damages are awarded.

And in *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1978), this Court said: "Congress did not intend that the vindication of statutorily granted rights would depend on the private party's economic resources or on the availability of free legal assistance." Ana Uviedo did vindicate her rights against national origin discrimination in this

case. She should be entitled to attorney's fees. In further support of the principle that attorney's fees can properly be awarded even though recovery by the plaintiff claiming the violation of civil rights is small in monetary terms, *see Carey v. Piphus,* 435 U.S. 247, 257 n. 11, 267, 98 S. Ct. 1042, 1049 n. 11, 1054, 55 L.Ed.2d 252 (1978); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1220 (5th Cir. 1982); *Milwe v. Cavuoto,* 653 F.2d 80, 84 (2d Cir. 1981).

This plaintiff should not suffer for failing to establish some claimed national origin discriminations when she successfully established other national origin discriminations under Title VII and was awarded damages. We cannot reconcile this holding with what should be the proper interpretation and application of Title VII in the awarding of attorney's fees. Uviedo fails to obtain an award of attorney's fees although she proved that the company discriminated against her based upon national origin in violation of law.

In spite of the denial of rehearing en banc in *Commonwealth,* we feel most strongly that the rule stated in the *Commonwealth* case is an incorrect application of *Hensley v. Eckerhart* and flies in the face of the congressional policy to award attorney's fees to those who prove discrimination and therefore prevail in Title VII cases. It is our view that this Court should reconsider en banc its unduly restrictive rule and bring its holdings in line with the *Hensley* case, congressional intent, and the other courts of appeals in the United States.

APPENDIX II

Ana M. UVIEDO,
Plaintiff-Appellee,

v.

STEVES SASH & DOOR COMPANY,
Defendant-Appellant.

No. 83-1415.

United States Court of Appeals,
Fifth Circuit.

Feb. 1, 1985.

Rehearing and Rehearing En Banc
Denied May 13, 1985.

In Title VII disparate treatment case, defendant employer appealed from judgment of the United States District Court for the Western District of Texas at San Antonio, Dorwin W. Suttle, J. The Court of Appeals, Garwood, Circuit Judge, 738 F.2d 1425, affirmed in part and reversed in part. Former employee filed petition for rehearing directed to prior holding reversing award of attorney fees in her favor. The Court of Appeals, Garwood, Circuit Judge, granted petition in part, holding that the "central issue" test had to be separately considered by district court as to each unit of related claims, unrelated to any others, in determining entitlement to attorney fees.

Petition for rehearing granted in part; judgment below affirmed in part and reversed and remanded in part.

Thornberry and Jerre S. Williams, Circuit Judges, reaffirmed their view expressed in special concurrence in original disposition.

George P. Parker, Jr., Theo. F. Weiss, San Antonio, Tex., for defendant-appellant.

Les Mendelsohn, Barry H. Beer, San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

(Opinion August 16, 1984, 5 Cir., 1984, 738 F.2d 1425)

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges:

GARWOOD, Circuit Judge:

Appellee Uviedo has filed a petition for rehearing directed to our prior holding reversing the district court's award of attorneys' fees in her favor. *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1432-33 (5th Cir. 1984). For the reasons and to the extent set out below, the motion is granted.

As we observed in our original opinion, Mrs. Uviedo's instant Title VII suit against appellant Steves Sash & Door Company ("Steves"), her former employer, presented four disparate wage claims, two claims asserting discriminatory denial of promotion and one claim of constructive discharge. For these various claims Mrs. Uviedo sought a total of approximately $48,000 in damages,

plus injunctive and declaratory relief. She was wholly unsuccessful on three of the four wage claims, on one of the two promotion claims, and on the constructive discharge claim. On the two claims on which she succeeded she was awarded a total of $386 damages, plus interest, representing $98 on one wage claim and $288 on one promotion claim. No injunctive or declaratory relief was awarded. We held that under these circumstances Mrs. Uviedo was not entitled to any attorneys' fees on any of her claims under "the central issue" test of *Commonwealth Oil Refining Co., Inc. v. E.E.O.C.*, 720 F.2d 1383, 1385 (5th Cir. 1983), *rehearing en banc denied*, 734 F.2d 1479 (5th Cir. 1984). In so holding, we applied the *Commonwealth* test to Mrs. Uviedo's lawsuit *as a whole*, observing that "under *Commonwealth Oil*, a greater measure of success in the *context of the suit as a whole* is necessary than that achieved by plaintiff here" (emphasis added), and that although Mrs. Uviedo prevailed in some claims, she did not prevail "in most of them, or in the most important of them, or in any that could fairly be described, singly or collectively, as the central issue in this case. . . . [U]nder the law of this circuit, she was not *'the* prevailing party' in this lawsuit. . . ." *Uviedo*, 738 F.2d at 1433.[1]

[1] We believe that the result we previously reached would have been mandated by *Commonwealth* had all of Mrs. Uviedo's claims been related to each other. However, our original opinion neglected to consider application of the doctrine that a plaintiff's claims which are

---

1. We also take this occasion to correct a printing error in our prior opinion: The fourth complete sentence on 738 F.2d at 1433 should commence "Appellee is correct" rather than "Appellant is correct."

unrelated to each other, though formally and properly joined in a single unit against a single defendant, are nevertheless to be considered for attorneys' fees purposes as if each were brought in a separate suit, so that a party's success or failure on one claim is not to be considered in determining that party's entitlement (or vulnerability) to attorneys' fees on an unrelated claim. As the Supreme Court stated in *Hensley v. Eckerhart,* 461 S. Ct. 424, 103 S. Ct. 1933, 1940 & n. 10, 76 L.Ed.2d 40 (1983):

> "The congressional intent to limit [attorneys' fees] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.[10]

" 10. If the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it. . . ."

While the procedural posture of the litigation and the disposition of the appeal there did not require the *Commonwealth* panel to analyze the facts before it in terms of the unrelated claims doctrine, that panel was nevertheless plainly aware of the doctrine.[2]

[2] Turning again to *Hensley,* "[w]e recognize that there is no certain method of determining when claims are 'related' or 'unrelated.'" *Id.* at 1941 n. 12. Nevertheless we believe that this record strongly suggests that at

---

2. Thus, we observed in *Commonwealth,* 720 F.2d at 1386 n.4: "As the Supreme Court indicated in *Eckerhart,* 103 S. Ct. at 1940, the district court should conduct a separate factual inquiry with regard to each 'unrelated claim' advanced by the plaintiff. Indeed, 'if [any unrelated] claim is frivolous, the defendant may recover attorney's fees incurred in responding to it. . . .' *Id.* n. 10."

least one of the claims on which Mrs. Uviedo succeeded was unrelated to any other claim, and that in any event the *Commonwealth* "central issue" test should be applied to each unrelated claim (or to each group of claims related to each other but unrelated to other claims) in the first instance by the district court, as we directed in *Commonwealth* itself. 720 F.2d at 1386 n. 4.[3]

Mrs. Uviedo had what may be fairly characterized as four separate periods of employment with defendant Steves, during which she worked in at least two or three different capacities. First, she worked from August 1968 to February 1970 in the accounting and payroll department, starting at a rate of $1.75 an hour and receiving $1.95 when she voluntarily terminated on account of pregnancy. Second, she performed temporary fill in or substitute work on several brief occasions during the period after February 1970 and before December 1971. On one of these occasions, prior to June 1971, she substituted for two weeks for Ms. Davis, of the accounting department, while the latter was on vacation. Third, she was rehired on a full-time basis December 27, 1971 and commenced work pursuant thereto in early January 1972 in the personnel department, though also performing some accounting duties. She was paid $2.00 an hour. Feeling that she was discriminated against in respect to her wages as compared to those of Ms. Fisher, also of personnel, Mrs. Uviedo resigned on or about February 15, 1972, filing her EEOC complaint a couple of days later. Fourth,

3. We observe that the district court's judgment, and its findings and conclusions, were all entered prior to *Hensley*, and, of course, prior to *Commonwealth*. While the district court's order denying motion for new trial was entered on the same day *Hensley* was decided, we believe it a fair assumption that the court below was not then aware of *Hensley* (which was not cited by or to it).

and finally, she was rehired by defendant April 24, 1972, and worked initially in the purchasing department and later in accounting and payroll, first at $2.25 an hour and then at $2.40, until mid-January 1973, when, again angered at another instance of what she felt to be wage discrimination, she resigned. Shortly afterward, she supplemented her EEOC complaint with additional charges.

Mrs. Oviedo's several claims, and the dispositions made of them in this litigation, may be summarized as follows:

Wage Claims

(1) Claim for discriminatory wage rate for the two weeks she substituted for Ms. Davis, based on a comparison of Mrs. Uviedo's $2.25 to the $2.50 or $2.60 paid Ms. Davis, a nonminority. This relates to Mrs. Uviedo's second, or part-time and intermittent, employment period; it may also relate to part of her initial period of employment. (Ms. Davis worked for defendant from 1962 until June 1971; she was rehired in September 1972.) The magistrate denied this claim, finding Ms. Davis' substantially greater tenure and skills, rather than nonminority status, to have been the basis for the distinction. The district court affirmed.[4]

(2) Claim for discriminatory wage rate for her third period of employment, in January and February 1972, based on a comparison of Mrs. Uviedo's $2.00 hourly rate to the $2.35 paid Ms. Fisher, a nonminority to whose position as personnel clerk Mrs. Uviedo succeeded. The magistrate denied this claim, but the district court reversed, awarding Mrs. Uviedo $98 damages in respect thereto. We affirmed.

(3) Claim for discriminatory wage rate during her fourth period of employment, starting April 24,

4. Mrs. Uviedo did not perfect an appeal from the district court's judgment.

1972, based on a comparison of Mrs. Uviedo's $2.25 an hour in the purchasing department to the $2.90 paid Ms. Green, a nonminority. The magistrate denied this claim, finding Ms. Green held a different, more responsible position. The district court affirmed.

(4) Claim for discriminatory wage rate during the latter part of her fourth period of employment, based on a comparison of the $2.40 hourly Mrs. Uviedo was then receiving in accounting and payroll to the $2.50 paid Ms. Stevens, a nonminority sales secretary hired in April 1972 and raised in December 1972 from $2.25 an hour to $2.50. The magistrate denied this claim, based on the differing positions, and Ms. Stevens' shorthand ability, which Mrs. Uviedo lacked. The district court affirmed.

Promotion Claims

(5) In July and August 1972, in her final employment period, Mrs. Uviedo sought but was denied a promotion to personnel clerk, the position going to Ms. Gibbon, a nonminority, in August. Though the magistrate denied this claim, the district court found it to have merit, and awarded Mrs. Uviedo differential back pay from August 1972 to January 1973, when she resigned, in the total amount of $288. We affirmed.

(6) In October 1972, also in her final period of employment, Mrs. Uviedo sought a promotion to head bookkeeper, but the position was given to Ms. Davis instead. The magistrate denied this claim, finding the promotion was based on Ms. Davis' greater qualifications and tenure. The district court affirmed.

Constructive Discharge Claim

(7) Finally, Mrs. Uviedo claimed that her resignation in January 1973 was a constructive discharge,

based, at least in large part, on her last wage claim, that concerning the December 18, 1972 raise given Ms. Stevens, and the denial of a raise Mrs. Uviedo sought in January 1973. The magistrate denied this claim, and the district court affirmed, at least in part on the theory that wage complaints do not give rise to constructive discharge.

[3, 4] It appears to us that Mrs. Uviedo's second wage claim, the only one related to her third period of employment or involving Ms. Fisher, is likely unrelated to any of her other claims. If this is so, then she would be entitled to attorneys' fees in respect to it, as she prevailed on that claim.[5] Moreover, the claim or claims pertaining to Mrs. Uviedo's first and second periods of employment likewise appear unrelated to any others in the suit, and if this is so then, since Mrs. Uviedo did not succeed on any such claim, she would not be entitled to any attorneys' fees in that respect.[6] Finally, some of

5. In its award of $7,500 attorneys' fees to Mrs. Uviedo, the district court relied on an open court stipulation of the parties which is set out in our prior opinion. 738 F.2d at 1432 n. 10. The language and substance of this stipulation, as well as the fact that it was entered into (and effectuated by the district court) prior to *Hensley*, plainly demonstrate that it was based on the legal assumption that, and was intended to apply to a situation in which, only one party "wins," and only one loses, the lawsuit as a whole, for purposes of eligibility for (and exposure to) award of attorneys' fees; it obviously was not intended to apply to attorneys' fees awards for individual claims (or groups of related claims) unrelated to others in the lawsuit. Therefore, we hold that the stipulation is inapplicable where the suit includes unrelated claims and so is required to be treated under *Hensley* as two or more lawsuits for purposes of eligibility for (and exposure to) attorneys' fees awards.

6. Since we upheld the determination of the magistrate and district court that none of Mrs. Uviedo's claims were frivolous, there is no question of attorneys' fees recovery by Steves. *See* our prior opinion. 738 F.2d at 1433 n. 13.

the remaining claims may be unrelated to each other. These matters should be addressed in the first instance by the district court, and its determination in regard thereto will be entitled to substantial deference.

[5] Accordingly, Mrs. Uviedo's motion for rehearing is granted in part. Our previous affirmance of the district court's judgment in all respects other than attorneys' fees remains in effect and is wholly undisturbed by our present action. However, our previous outright reversal of the award of attorneys' fees is set aside and in lieu thereof we now reverse and remand the award of attorneys' fees for further proceedings consistent herewith. On remand, the district court shall initially determine whether there are any unrelated claims and, if, as appears to be the case, there are, shall then divide the case into different units, each of which will consist of a single claim (or a single group of claims each related to the others) unrelated to any other in the case. As to each such unit separately considered the court will apply the "central issue" test of *Commonwealth* in determining entitlement to attorneys' fees.[7]

The petition for rehearing is granted in part. The judgment below is affirmed in all respects other than the award of attorneys' fees to appellee Uviedo. So much of the judgment below as awards Mrs. Uviedo attorneys' fees is reversed and remanded for further proceedings not inconsistent herewith.

AFFIRMED in part; REVERSED and REMANDED in part.

---

7. Judges Thornberry and Williams remain of the view, expressed in Judge Williams' opinion concurring in our original disposition, 738 F.2d at 1433, that the *Commonwealth* "central issue" test, though binding on this panel, should not be the law of this Circuit.

APPENDIX III

Ana M. UVIEDO,
Plaintiff-Appellee,

v.

STEVES SASH AND DOOR COMPANY,
Defendant-Appellant.

No. 83-1415.

United States Court of Appeals,
Fifth Circuit.

May 13, 1985.

George P. Parker, Theo. F. Weiss, San Antonio, Tex., for defendant-appellant.

Les Mendelsohn, Barry H. Beer, San Antonio, Tex., for plaintiff-appellee.

Susan Buckingham Reilly, Atty., E.E.O.C., Washington, D.C., for amicus E.E.O.C.

Appeal from the United States District Court for the Western District of Texas; Dorwin W. Suttle, Judge.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2/1/85, 5 Cir., 1985, 753 F.2d 369).

Before THORNBERRY, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel re-

hearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge, with whom POLITZ, RANDALL, TATE, JOHNSON and WILLIAMS, Circuit Judges, join, dissenting:

I respectfully dissent from the court's refusal to reconsider this decision en banc. Only the Fifth and the Eleventh Circuits make it so difficult for a plaintiff who obtains a judgment in a lawsuit to be identified as the prevailing party.

In *Hensley v. Eckerhart,*[1] the Supreme Court described a typical formulation for determining who are prevailing parties: " 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed *on any significant issue* in the litigation *which achieves some of the benefit* the parties sought in bringing suit,' "[2] quoting the First Circuit's opinion in *Nadeau v. Helgemoe.*[3] Every circuit court that has considered the question since *Hens-*

1. 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

2. 461 U.S. at 433, 103 S. Ct. at 1939. *See generally,* L. Bartell, "Federal Court Award of Attorney's Fees," 2 ALI-ABA Civil Practice and Litigation in Federal and State Courts 1057, 1111-12 (2d ed. 1984) and cases cited therein.

3. 581 F.2d 275, 278-79 (1st Cir. 1978) (emphasis added).

ley has followed this standard, except the Eleventh, which has simply followed the Fifth Circuit pre-*Hensley* formulation.[4] Success on any significant issue now suffices in eleven circuits: not only the First, but also the District of Columbia,[5] Second,[6] Third,[7] Fourth,[8] Sixth,[9] Seventh,[10] Eighth,[11] Ninth,[12] Tenth,[13] and Federal circuits.[14] Indeed a panel of this court has endorsed the any-significant-issue test. In *Posada v. Lamb County, Texas,*[15] the opinion, quoting *Hensley* states: "Plaintiffs may be considered to

---

4. *See, e.g., Miami Herald Publishing Co. v. City of Hallandale,* 742 F.2d 590, 591 (11th Cir. 1984) (post-*Hensley*); *Best v. Boswell,* 696 F.2d 1282, 1289 (11th Cir.), *cert. denied,* ____U.S.____, 104 S. Ct. 103, 78 L.Ed.2d 107 (1983) (pre-*Hensley*); *Doe v. Busbee,* 684 F.2d 1375, 1378-80 (11th Cir. 1982) (pre-*Hensley*).

5. *See Miller v. Staats,* 706 F.2d 336, 340-41 (D.C. Cir. 1983) (pre-*Hensley*).

6. *Gingras v. Lloyd,* 740 F.2d 210, 212 (2nd Cir. 1984) (post-*Hensley*).

7. *Abraham v. Pekarski,* 728 F.2d 167, 175 (3d Cir.), *cert. denied,* ____U.S.____, 104 S. Ct. 3513, 82 L.Ed.2d 822 (1984) (post-*Hensley*).

8. *Lutz Realty Co., Inc. v. U.S. Dept. of Housing,* 717 F.2d 929, 931 (4th Cir. 1983) (post-*Hensley*).

9. *Kentucky Association for Retarded Citizens, Inc. v. Conn,* 718 F.2d 182, 186-187 (6th Cir. 1983) (post-*Hensley*).

10. *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1276-77 (7th Cir. 1983) (post-*Hensley*).

11. *Fast v. School Dist. of City of Ladue,* 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc) (post-*Hensley*).

12. *Lummi Indian Tribe v. Oltman,* 720 F.2d 1124, 1125 (9th Cir. 1983) (post-*Hensley*).

13. *In re Kansas Congressional Dists. Reapportionment Cases,* 745 F.2d 610, 612 (10th Cir. 1984) (post-*Hensley*).

14. *Austin v. Dept. of Commerce,* 742 F.2d 1417, 1419 (Fed. Cir. 1984) (post-*Hensley*).

15. 716 F.2d 1066, 1071 n. 6 (5th Cir. 1983) (post-*Hensley*).

have prevailed if 'they succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit.' " In *Commonwealth Oil Refining Co. v. EEOC,*[16] however, we had adopted a different test, which the panel followed in this case.

The *Commonwealth Oil* rule violates the purpose of the fee provision of Title VII, which, as stated by the Supreme Court in *Christianburg Garment Company v. EEOC,*[17] is to "make it easier for a plaintiff of limited means to bring a meritorious suit."[18] Because the Title VII plaintiff is a "private attorney general," vindicating a policy of the highest priority, a prevailing plaintiff is to be awarded fees in "all but special circumtances."[19]

Whether a party has prevailed is, the Supreme Court instructs us in *Hensley,* a threshold determination.[20] Deciding this question by a "generous formulation," however, "brings the plaintiff only across the statutory threshold." It does not assure the prevailing party munificent recompense, for, as *Hensley* states, "It remains for the district court to determine what fee is reasonable."[21] *Uviedo* and *Commonwealth* elevate this threshold into a stumbling block, depriving successful and meritorious suitors even the reasonable reimbursement determined after the district court's scrutiny of hours actually worked,

---

16. 720 F.2d 1383 (5th Cir. 1983), *reh. en banc denied,* 734 F.2d 1479 (5th Cir. 1984).

17. 434 U.S. 412, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978).

18. *Id.* at 420, 98 S.Ct. at 699, *quoting* Remarks of Senator Humphrey at 110 Cong. Rec. 12724 (1964).

19. *Id.* at 417, 98 S. Ct. at 698 (citations omitted).

20. *Hensley, supra,* 461 U.S. at 433, 103 S. Ct. at 1939.

21. *Id.*

how much of this time was reasonably expended, counsel's hourly rates, the plaintiff's failure to succeed on some of the claims presented, and the other factors that *Hensley* requires to be considered in making an equitable judgment.

Hensley directs that "[a] request for attorney's fees should not result in a second major litigation."[22] The application of the central-issue test guarantees increasingly protracted and complicated litigation over fees applications in an effort to distinguish centrality from significance. This case was filed eight years ago, yet litigation over attorney's fees continues long after the substantive issues have been decided. The *Nadeau* test fulfills the purpose of Congress, facilitates judicial administration, and reduces litigation expense. It is time for us to adopt it and to make the threshold an entry rather than a barrier.

22. *Id.* at 437, 103 S. Ct. at 1941.